

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2080

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-2080

FRANCISCO SOLIMENE,

Appellant

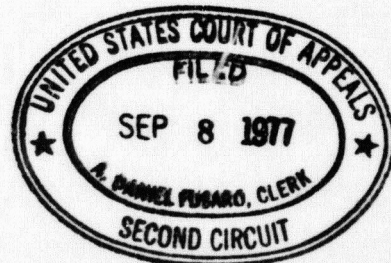
v.

UNITED STATES,

Appellee

On Appeal from the United States District Court
for the Eastern District of New York
Brooklyn Division

APPENDIX



PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES

1. January 28, 1977 -- Petition to Vacate Sentence
Pursuant to 28 U.S.C. §2255 filed.
2. March 17, 1977 -- United States Attorney ordered to
file Answer to Petition.
3. April 29, 1977 -- Answer to Petition filed by
United States Attorney
4. May 16, 1977 -- Reply to Answer filed by Peti-
tioner.
5. May 18, 1977 -- Order entered dismissing Peti-
tion without hearing.
6. June 5, 1977 -- Notice of Appeal filed by Peti-
tioner in United States District
Court.
7. July 18, 1977 -- Appeal docketed in United States
Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Respondent,	)	
	)	
v.	)	CASE NO.
	)	
FRANCISCO SOLIMENE,	)	
	)	
Movant.	)	

MOTION TO VACATE SENTENCE UNDER 28 U.S.C. §2255

FRANCISCO SOLIMENE hereby moves this Court, pursuant to 28 U.S.C. §2255, for an order vacating and setting aside the federal sentence previously imposed upon him by this Court. In support thereof, he would show the Court as follows:

1.

Movant, FRANCISCO SOLIMENE, is currently incarcerated and detained at the United States Penitentiary, in Atlanta, Georgia, pursuant to a judgment of conviction and sentence imposed in this Court.

2.

That sentence was imposed on May 19, 1972, in the United States District Court for the Eastern District of New York, Brooklyn Division, Brooklyn, New York, by the Honorable George Rosling, United States District Judge. A motion to reduce the sentence was thereafter denied in said Court on March 11, 1974, by the Honorable Jacob Mishler, Chief Judge. The sentence consists of a fifteen-year term of imprisonment followed by fifteen years of special parole and it was imposed pursuant to a judgment of conviction in Case No. 71-CR-1281, United States v. Boyce, et al.

3.

The judgment of conviction was entered after Movant was found guilty by a jury following his plea of not guilty. Movant timely appealed to the United States Court of Appeals for the Second Circuit which affirmed without opinion on March 7, 1973. The United States Supreme Court thereafter denied a petition for writ of certiorari without opinion. 414 U. S. 819 (1973).

4.

The sentence imposed upon Movant and the judgment of conviction upon which it is based are invalid because said conviction was obtained by the government through the use of perjured testimony. Said knowing use occurred as follows:

(a) The only evidence against Movant at his trial herein was the testimony of Ruben Americo Altamirano who testified as to Movant's alleged involvement in an importation of heroin into the United States from South America. Since his testimony constituted the only evidence against Movant, his credibility was a crucial factor.

(b) Said witness testified at the trial hearing that he had never been convicted of any crime in the countries of Argentina or Uruguay where he resided before coming to the United States. (TR. 617)

(c) Contrary to his testimony, said witness had an extensive record in Argentina, including at least two convictions as well as proceedings for adjudication as an habitual robber. A copy of said witness' criminal record in Argentina as well as an English translation thereof is attached hereto as Exhibit "A."

5.

The sentence imposed upon Movant and the judgment of conviction upon which it is based are further invalid because the above-referenced use of perjured testimony was a knowing use by the government. The fact that the witness had a criminal record was known to the government at the time that said witness testified to the contrary. Agents of the government represented earlier in the trial that the fingerprints of said witness had been sent to, inter alia, Argentina and that said witness had no criminal record. (TR. 529-532)

6.

The sentence imposed upon Movant and the judgment of conviction upon which it is based are further invalid because said judgment was obtained by prosecutorial misconduct in that government agents falsely represented to Movant that the only witness against him had no criminal record, when in fact he had such a record.

7.

The sentence imposed upon Movant and the judgment of conviction upon which it is based are further invalid in that the government failed to disclose at the trial herein all evidence known to it which was favorable to Movant. Said evidence relates to the above-described witness' credibility and the particulars which were not revealed are as follows:

(a) That the witness against Movant had a criminal record which was not disclosed to Movant.

(b) That said witness received further consideration for his testimony which was not revealed to Movant. Said consideration which was not disclosed consisted of the failure of

the government to surrender said witness to Argentine authorities even though his record shows that he has been wanted by said authorities since August 28, 1968. (See Exhibit "A") In light of the fact that said witness is still wanted to this date, it is clear that the government released said witness after his testimony against Movant rather than surrendering him to Argentine authorities.

8.

The grounds asserted in this Motion were not raised on appeal herein since the facts and evidence upon which the Motion is predicated are newly discovered. Movant has previously filed one motion under 28 U.S.C. §2255 with respect to this conviction. Said motion was filed in April of 1975 and shortly thereafter denied without opinion. Said motion was prepared without assistance of counsel and raised only those grounds previously raised on appeal from the conviction. It was denied on that basis. The interest of justice will be served by allowing this second motion under 28 U.S.C. §2255 since it does not raise any grounds previously adjudicated but rather raises grounds which are newly discovered. Since the first motion was made without the assistance of counsel and before knowledge of the facts on which the present motion was based, it should not preclude the present motion.

WHEREFORE, Movant prays that the Court grant him a hearing on this motion and that, following said hearing, his judgment of conviction and attendant sentence be set aside for all the reasons stated hereinabove.

Respectfully submitted,

Harold M. Weiner
Coles, Weiner, Tesser, P.C.
1775 Broadway, Suite 404
New York, New York 10010
(212) 586-5212


Michael Clutter
1409 Peachtree Street, N. E.
Atlanta, Georgia 30309
(404) 892-8890

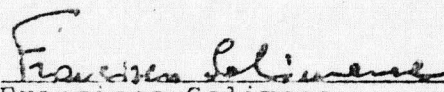
Counsel for Movant

STATE OF GEORGIA

COUNTY OF FULTON

VERIFICATION

FRANCISCO SOLIMENE, Movant herein, after first being duly sworn according to law, states under penalty of perjury that he has fully reviewed the foregoing motion and that the facts stated therein are true and correct to the best of his knowledge and belief.


Francisco Solimene

Sworn to and subscribed before
me this 14th day of January,
1977.


Notary Public

Notary Public, Georgia State at Large
My Commission Expires Feb. 3, 1980

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USO OFICIAL

CERTIFICO en cuanto ha lugar por derecho que por ante el Juzgado Nacional de Primera Instancia en lo Criminal de Instrucción Nº 15, Secretaría Nº 146 a mi cargo, tramita el sumario Nº 4774 y acumulados, el que se inició el 26 de julio de 1965, encontrándose procesado en el mismo por robo reiterado RUBÉN ALFONSO ALAMIRANO, argentino, nacido el 12 de octubre de 1941 en Concepción, provincia de Entre Ríos, hijo de Salustiano y de Dora Della Varga, con último domicilio conocido en Sección 4a., Llanza 5a., Inbelleón 30, casa 2, de la Ciudad General Belgrano, Partido de La Plata, provincia de Buenos Aires, de profesión carpintero, el que se encuentra con pedido de captura en el referido sumario desde el 20 de agosto de 1963, y según la planilla policial de antecedentes y los informes del Registro Nacional de Reinidencia y Estadística Carcelaria, el nombrado RUBÉN ALFONSO ALAMIRANO registra dos condenas, una de un año de prisión de fecha 27 de julio de 1961 por tentativa de uso ilegítimo de automotor y lesiones leves, y otra de dos años y seis meses de prisión de fecha 29 de julio de 1964, por ser autor del delito de robo en / rudo de tentativa, y asimismo registra un sobreseimiento provisional por el delito de robo, de fecha 21 de noviembre de 1961.- Asimismo certifico que el nombrado Almirano fue puesto en calidad de detenido a disposición del Tribunal con fecha 26 de abril de 1966, // permaneciendo en esa situación hasta el 1.º de agosto de 1966 en que fue puesto en libertad sin perjuicio de la prosecución de la causa, y ante su incomparecencia fue decretada su captura como se mencionara "ut supra".- Por orden de J.J. y para ser presentado ante las autoridades de la Justicia en lo Penal de la Ciudad de Atlanta, Estado de Georgia, Estados Unidos de Norteamérica, expido el presente que se- llo y firma en la Ciudad de Buenos Aires, a los veinticinco días del mes de noviembre del año mil novecientos sesenta y cinco.-

[Firma manuscrita]
JOSE MANUEL RICHDO
SECRETARIO

CERTIFICO que la firma que antecede ha sido puesto en mi presencia por el Dr. JOSE MANUEL RICHDO Secretario a cargo de la Secretaría / Nº 146, del Juzgado Nacional de Primera Instancia en lo Criminal de Instrucción Nº 15, interinamente a mi cargo.-
Buenos Aires, 25 de noviembre de 1975.-

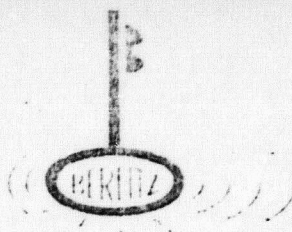
[Firma manuscrita]

EXHIBIT "A" - Page 1

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BERLITZ TRANSLATION SERVICE

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ATLANTA, GEORGIA 30326

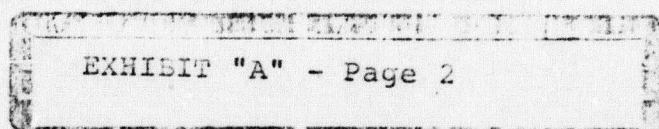
TELEPHONE: (404) 261-5062

I CERTIFY that the National Court of First Instance of Criminal Proceedings No. 15, Office of the Court Clerk No. 146 under my jurisdiction, transacts the summary proceeding No. 4974 and cumulative proceedings, which was initiated on July 26, 1965, and contains a proceeding for habitual robbery against RUBEN AMERICO ALTAMIRANO, argentine, born on October 12, 1941, in Concordia, Province of Entre Rios, son of Salustiano and Dora Delia Vargas, of last known residence in Section 4a, Block 5a, Pavilion 3, house 2, in the city General Belgramo, a Division of the Block, Province of Buenos Aires, carpenter by trade, who is wanted by the Law by the mentioned summary since August 28, 1968, and according to the police records and the reports of the National Registry of Recurrence and Jail Statistics, Ruben Americo Altamirano is recorded with two sentences, one for one year in prison dated July 27, 1961, for attempted illegal use of automobile and minor injuries, and the other for two years and six months in jail dated July 29, 1964, for attempted robbery, and also is recorded for a temporary stay for robbery, dated November 21, 1961. Also I certify the subject Altamirano was in detention by the Court on April 26, 1966, until August 5, 1966, when he was freed without damage to the prosecution of his case, and because of his failure to appear, an order was issued for his capture as mentioned "ut supra". By order of S.S. so that he may appear before the Penal Judicial authorities in the city of Atlanta, State of Georgia, United States of America, I hereby issue this document, which I seal and sign in the city of Buenos Aires, on the twentyfifth day of November, nineteen hundred and seventy five.

Jose Manuel Piombo
Secretary

I CERTIFY that the preceding signature in my presence is that of Dr. JOSE MANUEL PIOMBO Secretary in charge of the Clerk Office No. 146, of the National Court of First Instance of Criminal Proceedings No. 15, temporarily under my direction. Buenos Aires, November 25, 1975.

Juan Bautista Sojoak



Every care is taken to insure the accuracy of all translations. However, The Berlitz Schools of Languages of America, Inc., its divisions, affiliates, agents and employees shall not be liable for any damages due to error or negligence in translation or typing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

FRANCISCO SOLIMEME,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

RETURN TO THE
PETITION FOR WRIT
OF HABEAS CORPUS
PURSUANT TO 28
U.S.C. §2255

77 C 222

----- X

Respondent, the United States of America, by its Attorney, DAVID G. TRAGER, United States Attorney for the Eastern District of New York, RICHARD P. CARO, Assistant United States Attorney, of counsel, hereby answers the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2255, as follows:

I

The facts alleged in Paragraph 1, 2, and 3 of the Petition pertaining to petitioner's conviction, sentence, appeal, post-sentence motion and incarceration are admitted. The fact that petitioner previously filed a pro se petition for a writ of habeas corpus on other grounds, as stated in Paragraph 8 of the Petition, is also true, but whether it was prepared with or without assistance of counsel is a matter respecting which Respondent is without sufficient knowledge or information to form a belief as to the truth of the averment. Respondent also admits that Ruben Americo Altamirano ("Altamirano") testified at petitioner's trial that he had not been convicted of a crime in Uruguay or

Argentina. (Trial Tr. 617.) Respondent denies all other allegations and statements of fact contained in the petition, and states the following facts and reasons in opposition to the Court's holding a hearing and granting the writ.

II

Prosecutorial Misconduct

Petitioner contends that the Court should find the sentence and conviction to be constitutionally invalid

"because the above-referenced use of perjured testimony was a knowing use by the government. The fact that the witness had a criminal record was known to the government at the time that said witness testified to the contrary. Agents of the government represented earlier in the trial that fingerprints of said witness had been sent to, inter alia, Argentina and that said witness had no criminal record. (Tr. 529-532)"

(Relevant portions of the trial transcript are appended hereto as Exhibit I.) Respondent denies that there was a knowing use of perjured testimony by the Government or that the Government knowingly failed to disclose the existence of the purported Argentine criminal record of Altamirano.

Theodore Kreiger, defense counsel for co-defendant Louis Boyce, stated to the trial judge during the course of the trial that he was informed that Altamirano had a criminal record in South America and had requested

the Government to ascertain if a criminal record existed. (Trial Tr. 527-28.) Mr. William P. McMullen in response to Mr. Kreiger's questions stated that the fingerprints of Altamirano, as well as others, were sent to South American authorities and that the "Argentine police sent back a cable stating ***That there was also no criminal

record on file for Rubin Altamirano or Caesar Altamirano."*
(Trial Tr. at 532.)

Both Mr. George G. Bashian, Jr., Esq., the Assistant United States Attorney who was responsible for the prosecution of petitioner, and Mr. McMullen have submitted affidavits (appended hereto as Exhibits 2 and 3 respectively) attesting to the fact that at the time of the Boyce-Sollieme trial neither knew of the existence of any Argentine criminal record of Altamirano, saw or knew of the existence of any document in the Government's possession which stated that Altamirano had such an Argentine criminal record.

Indeed, this is collaborated by the fact that Mr. Kreiger had examined the Government's "case report" on Altamirano (Trial Tr. at 528) and apparently found no notation of a prior Argentine criminal conviction.

*/ Caesar Altamirano is Ruben Americano Altamirano's brother.

The general rule applicable to prosecutorial misconduct in failing to disclose Brady material was aptly summarized by Judge Moore in United States v. Morell, 524 F.2d 550, 553, (2d Cir. 1975):

****If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. E. g., United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982, 93 S.Ct. 2270, 36 L.Ed.2d 958 (1972); United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968). If, on the other hand, the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if there is a 'significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975); Grant v. Alldredge, 498 F.2d 376, 380 (2d Cir. 1974); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969).***"

Under the above facts, and even assuming Altamirano had prior convictions in Argentina and this information was material to the defense, no intentional suppression of evidence by the Government prosecutor can be said to have occurred here. The information was in the hands of the Argentine authorities and not the Government. While the Government prosecuting attorney may be charged with the responsibility of knowing what another

Government prosecutor and or his investigative agent may know, see e.g., Giglio v. United States, 405 U.S. 150, 154 (1972) and United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1974) he is not responsible for what any Government official may know. If the prosecuting Assistant "cannot be charged with the failure to produce information in the possession of any government official," United States v. Morell, supra, 524 F.2d at 555, then clearly he cannot be responsible for what foreign governments may know.

Alternatively, if the information is not material but merely significant in that skilled defense counsel would have been able to develop the information to possibly induce a reasonable doubt in the minds of the juror, it clearly can not be said here that the Government's failure to disclose the existence of the criminal record was negligent when Altamirano's fingerprints were sent to the Argentine authorities with the request for a copy of his criminal record.

Accordingly, there has not been an intentional, negligent or inadvertent suppression of evidence by the Government.

III

Altamirano's Prejudured Testimony

Petitioner bases his contention that Altamirano prejudured himself concerning his record of prior convictions

on the basis of the document attached as Exhibit A to the Petition. Respondent does not concede that this is the criminal record of the witness in question and further contends that petitioner on the face of the document fails to satisfy his prima facie burden in this regard. First Exhibit A is not a properly authenticated copy of any Argentine public document (Rule 902(d), Fed. R. Ev.), but rather a summary of a purported document. Second, it appears that Altamirano's fingerprints were neither sent to the Argentine authorities by petitioner nor did a set of fingerprints accompany Exhibit A. In addition Altamirano testified that he was born in Saldo, Uruguay, whereas the person identified in the statement was born in Concordia, Argentina. In light of his having testified

earlier that he lived in both Argentina and Uruguay it is unlikely that Altamirano would have lied about his place of birth since he could have had a criminal record in either country.^{2/} Finally Altamirano's extensive admissions of having engaged in criminal activities, in addition to those dealing with the narcotic transactions in question and underlying his own arrest and conviction, make it highly unlikely that Altamirano would have intentionally lied about an automobile offense and an

2/ It would appear from Altamirano's testimony that he lived in Uruguay from his birth in 1941 or 1942 to approximately 1951 when his family moved to Argentina. He subsequently left Argentina and lived in Uruguay from approximately 1964 or 1965 to 1970 when he came to the United States.

attempted robbery offense for which he was convicted when he was nineteen years old.

However, even assuming that Altamirano did have an Argentine criminal record, it is clear that such impeachment evidence was clearly cumulative.

As Judge Rosling, the trial judge, noted approximately midway during Altamirano's testimony (Trial Tr. at 530-531):

"You have heard enough from this fellow to hang fourteen witnesses, not one.

****It has been said any number of times by the Court of Appeals, which points to a record that indicates in a record that it appears as strongly as anybody could want to have it, that the witness leaves a lot to be desired in the way of integrity, honesty, character of being law abiding and so forth, and therefore any additional proof of criminality is so to speak 'gilding the lily,' to coin a phrase."

Altamirano's credibility was certainly in question and was vigorously attacked by defense counsel. The bases for their attack was not only the hope of a lighter sentence if he volunteered to be a Government witness but also his use of cocaine, his trafficking in stolen goods, his evasion of the tax laws, his participation in narcotic transactions and the possibility that he was falsely accusing the defendants to gain some benefit for his brother. (Trial tr. 1063-66, 1084-85, 1094-1104.)

Government counsel did not attempt to deny that Altamirano was a criminal or that he wasn't guilty of the many crimes he testified to but rather relied upon the substantial collaborative evidence in the record supporting Altamirano's testimony against petitioner and his co-defendant. (Trial tr. 1160-81, 1187-91.) The Jury chose to believe Altamirano and it is inconceivable that proof of the existence of the purported two Argentine convictions, then eleven years old, would have made any difference at all:

****In seeking to vacate a judgment allegedly based on perjured testimony, [petitioner] has the burden of establishing that it was material to the conviction****
Wapnick v. United States, 311 F. Supp. 183, 187 (E.D.N.Y.), aff'd, 423 F.2d 1361 (2d Cir.), cert. denied, 400 U.S. 845 (1970).

See also Giglio v. United States, supra, 405 U.S. at 153; Napue v. Illinois, 360 U.S. 264, 269-71 (1959); United States ex rel Thomas v. Brierton, 408 F. Supp. 14, 22 (E.D. Pa. 1976).

Indeed there is some question of whether it is still timely to raise this matter since petitioner's inquiry could have been made in 1972 as well as in 1975, see, e.g., United States v. Young, 426 F.2d 93, 95 (6th Cir. 1970), and the time to make a motion under Rule 33, Fed. R. Crim. P., on the basis of newly discovered evidence has long expired. Cf., United States v. Franzese, 525 F.2d 27, 31 n.7 (2d Cir. 1975), cert. denied, 424 U.S. 921 (1976).

CONCLUSION

For the above reasons the Court should deny the Petition without a hearing.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

BY:

Richard P. Caro
Richard P. Caro
Assistant U.S. Attorney

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

RICHARD P. CARO, being duly sworn, deposes and says that he is an Assistant United States Attorney, in charge of the within action; that he has read the foregoing return and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

Richard P. Caro
RICHARD P. CARO
Assistant U. S. Attorney

Sworn to before me this
29th day of April, 1977

Stella B. Magner

(EXHIBIT I OMITTED)

EXHIBIT II

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

FRANCISCO SOLIMENE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent,

----- X

STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

AFFIDAVIT

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GEORGE G. BASHIAN, Jr., Esq., being duly sworn, deposes
and says:

1. I am a former Assistant United States Attorney in the
Office of the United States Attorney for the Eastern District of
New York and in that capacity was the Government prosecuting and
trial attorney in United States of America v. Louis Boyce, et al.,
71 CR 1281, which resulted in the conviction of the petitioner
herein, Francisco Solimene. I make the following statement based
upon my personal knowledge and recollection, and also upon review
of certain documents pertaining to the original prosecution of the
case.

2. While I was an Assistant United States Attorney, I was responsible for the prosecution of Ruben Americo Altamirano, who was convicted by a jury in the case of United States of America v. Americo Altamirano, et al., 71 CR 835. No evidence of a prior conviction was offered or placed into evidence and I neither saw nor knew of the existence of any Federal Bureau of Investigation document or document from the United States Customs Service which stated that Ruben America Altamirano had a prior conviction.

3. During the course of the Boyce-Solimene trial, defense counsel requested me in a conversation off-the-record to ascertain if Ruben Americo Altamirano had a criminal record in Argentina or Uruguay. (Cf. Trial Transcript pp 527-28). I subsequently asked Mr. William P. McMullen of the United States Customs Service to make the appropriate inquiry. Mr. McMullen testified during the course of the trial that in response to the inquiries made, the Argentine Police sent back a cable which stated that there was no criminal record on file for Ruben Americo Altamirano. (Trial Transcript, p. 532).

4. At the time of the Boyce-Solimene trial, I neither saw nor knew of any document which stated that Ruben Americo Altamirano was convicted of any crime by the Argentine courts.

George G. Bashian, Esq.

Sworn to before me this
29th day of April, 1977

EXHIBIT III

PC:ijw
70,189

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

FRANCISCO SOLIMENE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

- - - - - X

STATE OF NEW YORK)

: ss.:

COUNTY OF KINGS)

WILLIAM P. McMULLEN, being duly sworn, deposes
and says:

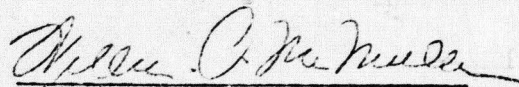
1. I was one of the United States Customs Service agents involved in the investigation of Ruben Americano Altamirano in 1971 and 1972 in connection with two criminal proceedings: United States of America v. Altamirano, et al., 71 Cr. 835, and United States of America v. Boyce, et al., 71 Cr. 1281. I make the following statements based upon my personal knowledge and recollection, and also upon review of certain documents pertaining to the above criminal proceedings.

2. I neither saw nor knew of the existence of any F.B.I. or United States Customs Service document which stated that Ruben Americo Altamirano had a prior conviction in Argentina. In fact, our office's investiga-

tive file on Altamirano was shown to defense counsel in the Boyce - Solimene case.

3. International inquiries were made to ascertain if Ruben Americo Altamirano had any prior convictions in Uruguay and Argentina. Copies of his fingerprints accompanied these inquiries. In response to these inquiries

both the Argentine police and Interpol responded that Ruben Americo Altamirano had no record of prior convictions.


William P. McMullen

Sworn to before me this
29th day of April, 1977.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	
	)	
v.	)	CASE NO. 77 C 222
	)	
	)	
FRANCISCO SOLIMENE,	)	
	)	
Petitioner	)	

REPLY OF PETITIONER

FRANCISCO SOLIMENE, Petitioner herein, replies to the government's Return, as follows:

The government refuses to admit that the Ruben Americo Altamirano who testified at Petitioner's trial is the same Ruben Americo Altamirano currently being sought by Argentine authorities. This contention does not constitute a valid reason for opposing a hearing on this petition rather; it raises a factual issue to be decided at such a hearing. Further, that factual issue is one most easily decided by information in the government's possession.

The government possesses the fingerprints of the Ruben Americo Altamirano who testified at Petitioner's trial. The government is further familiar with the procedures for inquiring as to criminal records from foreign governments. It would be simple enough for the government to send the witness' fingerprints to Argentina along with the document appended as Exhibit "A" to Petitioner's motion. Argentine authorities could then inform the Court whether or not the Ruben Americo Altamirano named in the document and the witness Ruben Americo Altamirano are one in the same.

A further method of resolving the issue might be by live testimony of George G. Bashian, Jr. and/or William P. McMullen. In his affidavit, George G. Bashian, Jr. states only that, at the time of Petitioner's trial, he neither saw or knew of any documents ascribing an Argentine criminal record to Ruben Americo Altamirano. This statement is pregnant with the admission that he has seen such a document since the trial or that he has other knowledge that Ruben Americo Altamirano does indeed have such a record. Responding to cross examination would delineate this point more accurately than a self-serving affidavit which denies only selected parts of Petitioner's allegations.

As to whether the government knew of Ruben Americo Altamirano's criminal record (or was in reckless disregard of whether or not he had a record), a hearing is necessary for a proper determination. If the Argentine authorities did in fact respond, why has the government failed to produce copies of that response? If inquiries were made of the Argentine government, why has the government not produced copies of those inquiries?

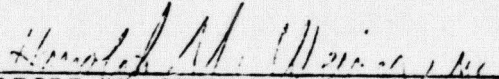
The affidavit of George G. Bashian, Jr. is not enlightening on this point, he states only that he never saw or knew of the existence of any United States government document establishing a criminal record for Ruben Americo Altamirano. He does not state that he has never seen a document from any other government establishing this point. Further, he does not know of his own personal knowledge what inquiries if any were made, he states only that he requested Mr. William P. McMullen to make inquiries and that Mr. McMullen testified that he had done so.

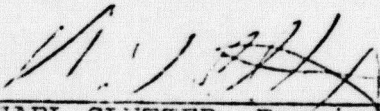
Mr. McMullen's affidavit is also pregnant with much admission. He too states only that he never saw or knew of the ex-

istence of an F.B.I. or Customs Service document establishing a criminal record for Ruben Americo Altamirano. Like Mr. Bashian, he does not state that he has never seen any other document establishing such a record.

In summary, the government's Return raises more questions than it resolves and points up the need for testimony at a hearing that can be tested by cross examination. Petitioner should not be foreclosed from establishing his contentions by self-serving affidavits. Petitioner would ask that the Court order the government to produce copies of the inquiries they allege are made as well as copies of the responses they allegedly received. Petitioner would further request the Court to order the government to produce Ruben Americo Altamirano's fingerprints to counsel for Petitioner so that they can be forwarded to Argentine authorities along with Petitioners Appendix "A." Upon receipt of a reply from Argentine authorities as well as production by the government of the documents requested, the Court is requested to hold a hearing on Petitioner's motion wherein Mr. Bashian and/or Mr. McMullen may be cross examined.

Respectfully submitted,


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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

FRANCISCO SOLIMENE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

- - - - - x

77 C 222

(71 CR 1281)

Memorandum of Decision
and Order

May 18, 1977

A P P E A R A N C E S:

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MISHLER, CH. J.

The petitioner moves, pursuant to 28 U.S.C. §2255,
for an order vacating and setting aside the federal sentence
previously imposed on him by the late Honorable George

Rosling. On May 19, 1972, he was convicted after a jury trial of conspiracy to smuggle and sell heroin. Judge Rosling sentenced petitioner to a fifteen-year term of imprisonment. On March 7, 1973, the judgment of conviction was affirmed without opinion by the United States Court of Appeals for the Second Circuit. 472 F.2d 1404 (2d Cir.), cert. denied, 414 U.S. 819, 94 S.Ct. 42 (1973). On March 11, 1974, the petitioner's motion to reduce his sentence was denied by this court.

The chief witness at petitioner's trial was a Ruben Americo Altamirano. He testified to petitioner's involvement in a scheme to import heroin into the United States from South America. On cross-examination, the witness was asked whether he had ever been convicted of a crime in Argentina or Uruguay, countries where he had resided before coming to the United States. He replied that he had not, although he did admit to extensive involvement in illegal narcotics trafficking.

The petitioner alleges that Altamirano lied about his prior criminal record. Attached to the petition is a document alleged to be the witness' criminal record in

Argentina, which allegedly includes two convictions for robbery. Moreover, it is contended, the government was aware that Altamirano was committing perjury; government agents falsely represented to petitioner that Altamirano had no criminal record in Argentina; and the government failed to disclose that, in return for Altamirano's testimony, the government had agreed not to surrender him to Argentine authorities. The petitioner also states that "[t]he grounds asserted in this motion were not raised on appeal herein since the facts and evidence upon which the motion is predicated are newly discovered." Aside from the alleged record of conviction, no supporting affidavits or documents have been supplied to support the claim of government misconduct or to explain the circumstances of the asserted post-trial and post-appeal discovery of new evidence.

The government denies that it knowingly used perjured testimony or failed to disclose the existence of the alleged Argentine criminal record of Altamirano. It points out that during the trial, counsel for one of petitioner's co-defendants asserted that Altamirano had a criminal record in South America and that the government had been requested to ascertain if a criminal record existed. The government

informed the trial judge at this point that Altamirano's fingerprints had been sent to South American authorities and that the "Argentine police sent back a cable stating that . . . there was . . . no criminal record on file for Ruben Altamirano." (Tr. 532). The assistant United States attorney who prosecuted petitioner has submitted an affidavit attesting that at the time of the trial, he was unaware of the existence of Altamirano's putative criminal record.

The most recent discussion by the Supreme Court of the prosecution's obligation to disclose exculpatory evidence is United States v. Agurs, ____ U.S. ____, 96 S.Ct. 2392 (1976). There, the Court pointed out that the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) applies in three sets of circumstances. In the first situation, the undisclosed evidence demonstrates that the "prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." 96 S.Ct. at 2397 (footnote omitted). In such a case, a conviction obtained by the knowing use of perjured testimony is "fundamentally unfair" and must be set aside if there is any "reasonable likelihood that the false testimony could have affected the judgment of the jury."

Id. See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763

(1972); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974).

In the second circumstance, a defense request for specific evidence is ignored by the prosecution. This essentially was the Brady case itself, which held that if the request is material, or if a substantial basis exists for claiming materiality, the prosecutor is obligated to furnish the information. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 96 S.Ct. at 2399.

In the Second Circuit, at least until the decision in Agurs, the grant of a new trial on the basis of a Brady claim depended on the extent of the government's culpability. Thus,

[i]f the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. E.g., United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982, 93 S.Ct. 2270, 36 L.Ed.2d 958 (1972); United States v. Keogh, 391 F.2d 138, 146-47 (2d Cir. 1968). If, on the other hand, the government's failure to disclose is merely inadvertent

or negligent, a new trial is required only if there is a "significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Rosner, 516 F.2d 269, 272 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975); Grant v. Alldredge, 498 F.2d 376, 380 (2d Cir. 1974); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969).

United States v. Morrell, 524 F.2d 550, 553 (2d Cir. 1975).

The third category is the failure of the prosecutor to disclose exculpatory material in his possession that is unknown to the defense. This was the situation in Agurs, where the Court of Appeals had reversed a conviction because the prosecutor had failed to volunteer material evidence. The Supreme Court reversed the lower court decision, holding that the prosecutor has a duty of disclosure but that the failure to disclose does not warrant a new trial unless "the omitted evidence creates a reasonable doubt that did not otherwise exist." 96 S.Ct. at 2401. Significantly, at least with respect to this category, the "moral culpability, or the willfulness," of the prosecutor in withholding evidence does not bear on the issue of the grant of a new trial. The Court noted that in Brady the good faith or bad faith of the

prosecutor was rejected as a dispositive consideration. As stated by the Brady Court:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87, 83 S.Ct. at 1196-97, quoted in United States v. Agurs, 96 S.Ct. at 2400 n. 17.

Here, the first two categories of Brady-type violations are involved: (1) the alleged knowing use of perjured testimony; and (2) the alleged failure to disclose exculpatory evidence in response to a specific request. The allegation of perjury is a serious one which, if proven, might justify a new trial. The government has flatly denied the allegation. Ordinarily, petitioner would be entitled to an opportunity to prove his contentions. But before the petitioner may obtain a hearing, he must provide at least some support for his allegations. All that we have before us is an unsupported charge of perjury. No affidavits or documentary evidence are offered to support the claim. The petition does not inform us why the government's alleged subornation of perjury was not discovered until five years

after the conviction. The presentation of conclusory allegations unsupported by specifics does not justify a hearing. See Blackledge v. Allison, ____ U.S.L.W. ____ (U.S. May 2, 1977).

As to the alleged failure to obtain the petitioner's criminal record and the agreement not to surrender Altamirano to Argentine authorities, assuming the existence of these facts, nonetheless the petitioner is not entitled to a new trial.^{/1} It is worth noting that Brady speaks only of evidence material to "guilt or to punishment," not of evidence useful only for impeaching credibility. Of course, subsequent to the decision in Brady, the failure to provide evidence relating to credibility has been held to justify a new trial in appropriate circumstances. See Giglio v. United States, supra; United States v. Morrell, supra. If the government's case depends on a single witness, the credibility of that witness is relevant to the question of guilt, and prior criminal acts are relevant to credibility. But it is important to recognize that this type of evidence bears a more tenuous relationship to guilt than truly exculpatory evidence such as the statement of an eyewitness that the defendant did not commit the crime. The fact that the Brady material at issue bears solely on credibility does not lessen its

importance in determining guilt but does suggest that, unlike classic exculpatory evidence, it may under some circumstances be only cumulative in effect and therefore not truly material or of probative significance.

Such circumstances are present in this case. Altamirano was the government's chief witness against petitioner and his co-defendants. His credibility and motive for testifying were important in determining guilt or innocence.

The jury, however, was well aware that Altamirano was no babe in the woods. He testified about his conviction for conspiracy to possess and sell one hundred and fifty-five (155) pounds of heroin (Tr. 237-38); his participation in other narcotics transactions (Tr. 433-36); his cooperation with the government in the hope of obtaining leniency (Tr. 405-06); his personal use of narcotics (Tr. 610); his evasion of the tax laws (Tr. 622-23); and his other possible motive for testifying, which was to obtain a promise from the government not to prosecute his brother for perjury (Tr. 656-57).

Evaluating the significance of the Brady material at issue here "in the context of the entire record," United States v. Agurs, supra, 96 S.Ct. at 2402; United States v. Stassi, 544 F.2d 579, 584 (2d Cir. 1976), leaves no reasonable doubt

that additional material such as the two decade-old robbery convictions in Argentina could not have changed the jury's opinion of Altamirano's credibility.¹² While there was more than enough evidence to find Altamirano an untrustworthy witness, it is also apparent that the corroborative documentary evidence and testimony introduced by the government supported Altamirano's testimony sufficiently for the jury to believe that, at least in this case, he was telling the truth.

Since the character of the omitted evidence lacks significant probative value, the issue of prosecutorial culpability is irrelevant. The decision in Agurs plainly rejects the approach adopted by the Second Circuit in United States v. Morrell. See Moynahan v. Manson, 419 F.Supp. 1139, 1147 n.21 (D. Conn. 1976). If the omitted evidence lacks probative significance,

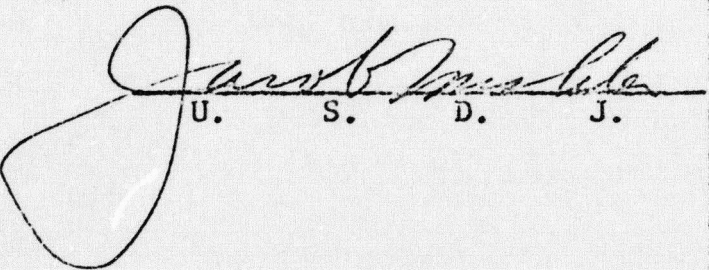
no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense.

United States v. Agurs, supra, 96 S.Ct. at 2400. This reasoning applies both to failure to honor a specific request and the failure to volunteer Brady material. Id., 96 S.Ct. at 2400 n.17.

In sum, petitioner has failed to establish a reasonable basis for his claim of subornation of perjury to warrant a hearing on that issue, and, in view of the entire record, the omission of Brady material did not deprive petitioner of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. Accordingly, the petition is dismissed, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of respondent dismissing the petition.


U. S. D. J.

FOOTNOTES/1

This is a generous assumption on our part, in light of the nature of the newly-discovered Brady material. The alleged arrest record is a single-page xerox copy of a letter from the "Secretary in charge of the Clerk Office No. 146, of the National Court of First Instance of Criminal Proceedings No. 15, Buenos Aires." The letter, dated November 25, 1975, attests to proceedings involving Altamirano's convictions for illegal use of a car and robbery in 1961 and for robbery in 1964.

The letter is not a properly authenticated copy of an official Argentine public document, see Fed.R.Ev. §902(3), but rather a summary of purported documents. The petitioner has not provided any details as to how this letter was obtained or why the actual record of Altamirano's alleged robbery convictions is not available.

The claim that Altamirano testified in exchange for a government promise not to return him to Argentina is apparently based on the inference that, first, Altamirano is still sought by the Argentine government because of his alleged robbery convictions and, second, that the government intended to return him to Argentina if he did not cooperate.

/2

The standard applicable to subornation of perjury -- a "reasonable likelihood that the false testimony could have affected the judgment of the jury" -- seems indistinguishable in the context of this case from the standard applicable to the failure to comply with a Brady request or to volunteer Brady material -- "the omitted evidence creates a reasonable doubt that did not otherwise exist." If the omitted evidence is pertinent to credibility, the false testimony presented

FOOTNOTES (continued)

to the jury --the witness' lack of a criminal background -- is the same whether the prosecutor suborned perjury or intentionally refused to obtain impeaching material. This suggests that, at least where credibility material is involved, if the omitted evidence lacks probative value it is irrelevant that the prosecutor suborned perjury. The standard should depend on the character of the omitted evidence. Since prosecutors are not immune from criminal liability for willful acts such as subornation of perjury, see Imbler v. Pachtman, ___ U.S. ___, 96 S.Ct. 984, 994 (1976), deterrence of prosecutorial misconduct could better be effected by prosecution or professional discipline than by ordering a new trial solely because of prosecutorial misconduct. However, the Agurs Court emphasized that prosecutorial subornation of perjury involves "a corruption of the truth-seeking function of the trial process," 96 S.Ct. at 2397, and we assume that for this reason where the prosecutor's case intentionally includes perjured testimony a less strict standard of materiality governs the right to a new trial than in cases involving failure to comply with Brady requests or to volunteer Brady material.

AFFIDAVIT OF SERVICE

After being duly sworn according to the law, the undersigned MICHAEL CLUTTER states that he deposited in the United States mail two copies of the foregoing Appendix contained in a securely enclosed postpaid envelope, addressed and directed to the person hereinafter named at the place and address stated below, on September 6, 1977:

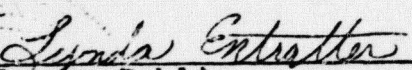
David G. Trager
United States Attorney
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11202

September 6, 1977.



Michael Clutter
Counsel to Appellant

Subscribed to and sworn
before me this 6th day
of September, 1977.



Notary Public

Notary Public, Georgia State at Large
My Commission Expires Feb. 3, 1980